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CASE NUMBER _____

IN THE

United States Supreme Court

OCTOBER 1983 TERM

ABBOT BUDD KAUFER MEDINA, *et. al.*

Plaintiffs - Respondents

v.

DAVID CASTAÑON PEREZ, *et. al.*

AMERICAN INTERNATIONAL INSURANCE COMPANY OF PUERTO RICO, *et. al.*

Defendants - Petitioners

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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Comes now the defendants through their undersigned attorneys and respectfully petitions this Honorable Court for Certiorari in order to review a decision issued by the Honorable United States Court of Appeals for the First Circuit.

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THE QUESTION PRESENTED FOR REVIEW

The issue in this case involves the jurisdiction of federal courts under admiralty when a sixteen foot pleasure boat allegedly struck two swimmers near the sandy area of a public beach. The U.S. District Court determined that although the boat was in navigable waters, following this Court's opinion in ***Foremost Insurance Company v. Richardson,*** 457 U.S. 668 (1982) there was no jurisdiction because such incident did not bear a significant relationship to traditional maritime activities. The United States Court of Appeals for the First Circuit reversed through a judgment entered on May 2, 1984. Petition for rehearing was denied on June 6, 1984.

The question presented for review is whether an accident occuring in a public beach involving a collision between a pleasure boat and two swimmers, and which involves no traditional maritime activity other than the use of navigable waters, is sufficient to sustain admiralty jurisdiction.

Petitioner herein claims there is no admiralty jurisdiction under ***Foremost*** since the accident had no impact or "substantial effect" on maritime commerce, and there occurred no

"disruptive impact" on navigation. The accident was strictly of a local nature and the swimmers were immediately pulled out of the water and given medical attention.

The alleged basis for federal jurisdiction is 28 USCA 1333 through which the District Courts have original jurisdiction of any civil case of admiralty or maritime jurisdiction, as interpreted and limited by this Honorable Supreme Court in the cases of ***Executive Jet Aviation, Inc. v. City of Cleveland,*** 409 U.S. 249 (1972) and the case of ***Foremost.***

OPINIONS DELIVERED BY THE COURTS BELOW

Appended to this petition in accordance with Rule 21.1 (k) are the opinions of the Honorable District Court for the District of Puerto Rico dated November 15, 1983 in which federal jurisdiction was denied and of the Honorable United States Court of Appeals, for the First Circuit, dated May 2, 1984 which reversed the District Court's opinion.

Also in the appendix we included the Order of the Court denying our petition for rehearing dated June 6, 1984.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered by the United States Court of Appeals for the First Circuit on May 2, 1984. Rehearing was denied on June 6, 1984.

Jurisdiction of this Honorable Court is claimed under 28 USCA § 1254 (1) and under Rules 17 and 20 of the Supreme Court.

STATUTE INVOLVED IN THE CASE

The statute involved in this case is 28 USCA § 1333 which reads:

> § 1333 Admiralty, maritime and prize cases
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled,
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 23, 1948, c. 646 Stat. 931; May 24, 1946, c. 139, § 79, 63 Stat. 101.

The controversy before this Court is whether the First Circuit Court of Appeals failed to follow this Court's opinion in the cases of ***Foremost Insurance Company v. Richardson,*** 457 U.S. 668 (1982) and ***Executive Jet Aviation Inc. v. City of Cleveland,*** 409 U.S. 249 (1972), by holding that maritime jurisdiction attaches to any accident that occurs in navigable waters.

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

The accident involves a sixteen foot pleasure boat which allegedly struck two swimmers in navigable waters near the sandy area of a public beach. Both were swimming in about six feet of water.

This public beach is on the shores of the Atlantic Ocean and is frequented, especially on Sundays, by many swimmers and on occassions by some small pleasure boats. As soon as the accident occurred, the swimmers were pulled out of the water and given immediate medical attention. It is alleged that the boat causing the accident was driving at a high speed at the moment of the accident and continued on its course without stopping nor rendering assistance to the two swimmers.

The District Court determined that the waters where the accident occurred were navigable waters, although this fact was disputed by petitioners herein who claim that the reefs surrounding the public beach make it impossible or impractical for commercial navigation.

ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

We have three reasons to believe that the writ of Certiorari should be granted in our case. First, the First Circuit Court of Appeals has decided a Federal question so as to be in direct conflict with applicable decisions of this Court. Secondly, said Court of Appeals rendered a decision in conflict with the decision of another Court of Appeals on the same matter. Thirdly, the First Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be clarified and settled by this Court.

I

THE FIRST CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Supreme Court of the United States granted certiorari in the case of ***Foremost*** not only to determine whether the collision of two pleasure boats on navigable waters falls within the admiralty jurisdiction of the federal courts, but also to resolve the confusion in the lower courts respecting the impact of ***Executive Jet*** on traditional rules for determining federal admiralty jurisdiction. ***Foremost*** decided that an accident between two pleasure vessels at the entrance of an important navigable river had sufficient relationship to traditional maritime activity so as to fall within federal admiralty jurisdiction because such accident could affect the navigation of other commercial vessels that used the waterway.

The rationale of the Supreme Court in ***Foremost*** is contained in the following sentence taken from said case:

> . . .the potential disruptive impact of a collision between boats on navigable

> waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce. (457 U.S. 668, 675)

Prior to the above sentence, and leading the theory of the majority opinion the Court said:

> . . .for example, if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. (457 US 668, 675)

We understand the opinion of the Court in ***Foremost*** to expand admiralty jurisdiction to include boating accidents occuring on navigable waters when such accidents have or could have a disruptive impact on traditional maritime commerce. The example used by the court is clear. Two pleasure boats which collide in navigable waters could present a hazard to

navigation until the obstacle is removed.

In the present case, the Court of Appeals relies on another sentence from the ***Foremost*** decision which says:

> . . .because the "wrong" here involves the negligent operation of vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court. (457 US 668, 674)

The Supreme Court seems to be saying that the negligent operation "per se" of any vessel (even a rowboat) on navigable waters is sufficient to confer admiralty jurisdiction on federal courts. For this reason the First Circuit Court of Appeals reversed the District Court and granted federal jurisdiction.

We respectfully suggest that if the published Appeals Court opinion in this case is allowed to stand, then every conceivable accident involving any pleasure craft (rowboats, canoes, wind surfers) that are used negligently in navigable waters will have a sustainable federal maritime case regardless of the strictly local nature of the accident. Had this been the intention of the Supreme Court in

Foremost it would have said so. It is relevant to note that after said sentence regarding "the negligent operation of a vessel on navigable waters" the *Foremost* opinion went on to give the example of the two boats colliding at the mouth of the St. Lawrence Seaway and the substantial effect on maritime commerce such a collision would have. It also used adjectives such as "potential" and "disruptive" to describe the impact of a collision between two boats on navigable waters. It then went on to quote the rule of "significant relationship with maritime commerce" which has been cited extensively in every similar case regarding admiralty jurisdiction since *Executive Jet.*

We understand that there may be a "significant relationship with maritime commerce" when two boats collide at the mouth of a port, but not when a pleasure boat strikes a swimmer a few feet from the shore.

Unless a pleasure boat is anchored on navigable waters, it must be navigating on such waters. Contrary to *Foremost,* the Court of Appeal decided that *every* accident inolving *any* pleasure craft while going from one place to the other (navigating) in *any* navigable stream or water body would fall under the jurisdiction of admiralty courts. If the decision in this case is allowed to stand the worst fears of the dis-

senting Justices in ***Foremost*** (Chief Justice Burger, Justice O'Connor, Justice Powell and Justice Rehnquist) would be justified. The operators of canoes, rowboats, sailboats, motor boats and perhaps even surfboards, 1, that were involved in accidents could be sued in federal courts under admiralty jurisdiction; the sole factor under the First Circuit decision is that the craft be operating in a navigable stream.

One sentence in the opinion of the Court of Appeals summarizes the prevailing attitude of said court in granting jurisdiction. It said:

> The actor in this case was a vessel, and that is enough.
> (Appendix, page 14)

That Appellate Court statment is directly contrary to the holding of this court in ***Foremost*** and ***Executive Jet.*** Two strict doctrines were struck down in both cases. The "strict locality rule" was abolished in ***Executive Jet*** and the "strict commercial rule" was discontinued in ***Foremost.*** Both strict rules had been used as

1. A pre-Executive Jet decision upheld federal jurisdiction under admiralty in a surfboard accident. ***Davis v. City of Jacksonville,*** 1965, 251 F. Supp. 327.

the basis for establishing federal jurisdiction in admiralty cases for decades and these two leading cases came to discontinue both rules.

The strict locality rule said that there was federal jurisdiction in admiralty in ***any*** tort occuring on navigable waters. The ***Executive Jet*** decision abolished such "strict locality rule" by citing well established early maritime case law; (Victoria Carriers, Inc. v. Law, (1813) 404 US 202, 205, 40 LMD 2d 383, 92 Ct 418).

It is now also well established that the strict locality rule was struck down by this court in ***Executive Jet.*** However, the First Circuit Court of Apeals contrary to ***Executive Jet,*** has reverted to the use of the strict locality rule. Thus, ***any*** negligent operation of ***any*** pleasure craft on navigable waters will be allowed admiralty jurisdiction. This is now the law of the First Circuit, unless this court rules otherwise.

As long as there is navigation and negligence, jurisdiction will be granted! The old strict locality rule cited in ***Executive Jet,*** stated:

> . . .if the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.
> (409 US 249, 253)

This rule was expressly revoked in ***Executive Jet.*** The Court of Appeals decided this important federal question in a way which is in direct conflict with the mandate of ***Foremost*** and ***Executive Jet.***

II
THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

Contradictory opinions from the circuit courts exist to this day regarding pleasure boating accidents and federal jurisdiction. The Court of Appeals in our case voices such contradictions and cites the case of ***Crosson v. Vance,*** of the 4th. Circuit, 1973, 484 F. 2nd 840, which held that admiralty jurisdiction did not extend to a suit by a water skier who was struck by a motor boat. On the other hand, there exists the case of ***Richards v. Blake Building Supply, Inc.,*** also in the 4th Circuit, 1975, 528 F. 2nd 745, which held that jurisdiction did exist in a suit by a pleasure boat passenger injured from an explosion aboard such vessel, and in another case involving a collision with a river bank. The ***Crosson*** decision should have been the leading

case since it involved a swimmer struck by a boat; whereas ***Richards*** involved explosions on a boat and a collision with a river bank. Thus, the First Circuit decision in this case also directly contradicts the Fourt Circuit decision as regards an injured swimmer and a passing boat.

This court, in ***Executive Jet,*** 409 US 249, Page 256, cited injured swimmer cases criticizing their "mechanical application" of the strict locality rule "in sustaining admiralty jurisdiction". The Court cited in its criticism the cases of ***King v. Testerman,*** 214 F. Supp. 335, 1963; and ***Davis v. City of Jacksonville Beach,*** 251 F. Supp. 327, 1965, among others. Both of these cases involved negligent craft navigation and swimmers. The ***Executive Jet*** court not only criticized them, but also uses such criticism as a basis and argument revoking the application of the strict locality rule, and denying federal maritime jurisdiction.

Facing such conflicting opinions by circuit courts vis a vis the rationale of ***Executive Jet*** in its injured swimmer cases and absence of jurisdiction, the District Court of Puerto Rico carefully analyzed the rest of admiralty tort jurisdiction used throughout the years up to and including ***Foremost.*** The District Court scholarly elaborated the extent of ***Foremost's***

"potential disruptive impact" sentence in order to reach its conclusion. In order to do so, the District Court defined "navigable waters";1 It dealt with "traditional maritime activities";2 It also entered into the collision between vessels in navigation and submerged hulks of wrecked vessels as traditional concern of admiralty;3 Finally, the District Court took into consideration the issue of injured swimmers4 and injured water skiers.5

In following the opinion of ***Crosson v. Vance,*** supra, the District Court also refused to exercise jurisdiction over a tort involving an injured swimmer. The First Circuit Court, however, in support of its clearly conflicting decision in this case, cited ***Richards v. Blake Building Supply, Inc.,*** (4th Cir, 1975, 528 F 2nd 745) a decision of the same Fourth Circuit which involved a different set of facts (explosion and collision but no swimmers) and legal issues.

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1. ***United States v. Stoeco Homes,*** Inc. 498F 2nd 597, (3d Cir. 1974, Cert. denied, 420 US 927 1975)
2. ***Foremost*** and ***Executive Jet***
3. ***Lane v. United States,*** 529 F 2nd 175, 4th Cir. 1975.
4. ***Davis v. City of Jacksonville Beach, Florida,*** 251 F. Supp. 327, 1965.
5. ***King v. Testerman,*** 214 F. Supp. 335, 1963
   Crosson v. Vance, 484 F. 2nd 840, 4th Cir. 1973
   Jorsch v. LeBeau, 449 F. Supp. 485, 1978.
   Webster v. Roberts, 417 F. Supp. 346, 1976.

This Honorable Court should settle the conflict between the two Circuits. If the District Court was wrong, as indicated by the opinion of the Court of Appeals, it seems several other District Courts have also been wrong in the interpretation of this issue as we shall see in the discussion of our next topic.

III

AN IMPORTANT QUESTION OF FEDERAL LAW HAS NOT BEEN CLEARLY SETTLED

From 1963 until the ***Executive Jet*** decision of 1972 several cases involving swimmers were decided in favor of jurisdiction under admiralty law. These were the cases of ***King. v. Testerman,*** 1963, 214 F. Supp. 335; ***Davis v. City of Jacksonville, Florida,*** 1965, 251 F. Supp. 327; and ***Green v. Ross,*** 1972, 338 F. Supp. 365.

As we stated above, these cases were critized by the ***Executive Jet*** court when it considered that jurisdiction was being allowed by the District Courts under the "strict locality rule" which it proceeded to revoke. Not only did ***Executive Jet*** disapprove decisions sustaining admiralty jurisdiction over claims involving swimmers, but it also upheld decisions which required some connection with traditional maritime activity. (***Executive Jet,*** 409 US 249 at. 256-257).

The logical conclusion to be reached in such approval and disapproval by the Supreme Court in water skier and surfboard accidents in shallow waters, is that such cases should no longer be tried in Federal Courts under admiralty jurisdiction. For this reason in 1976 a water skier case was dismissed for

lack of jurisdiction in the Fourth Circuit (***Crosson v. Vance,*** 484 F 2nd. 840).

In 1976 in the case of ***Webster v. Roberts,*** (417 F. Supp. 346) a Federal District Court applied the case of ***Crosson*** cited previously and dismissed jurisdiction in another water skier case.

In 1974, the Eighth Circuit issued the ***St. Hilare Moye v. Henderson*** decision (494 F. Supp. 973) which complicated matters. It found jurisdiction over a boating accident involving a small pleasure craft. This case is the basis for respondent's brief in our case before the First Circuit. However, in 1978, a District Court in the case of ***Jorsch v. LeBeau,*** (449 F. Supp. 485) dealt with a water skier who was injured by a boat and expressly rejected the ***St. Hilare Moye*** case cited above (decided by the Eighth Circuit) and instead applied the doctrine of the Fourth Circuit in 1973 by ***Crosson v. Vance.***

To complicate matters even further, the ***St. Hilare Moye*** court itself, although deciding in favor of jurisdiction in a pleasure boat accident, recognized elsewhere in the opinion that a case involving a personal injury claim by a water skier has "no connection with traditional maritime activity". ***St. Hilare Moye, supra,*** at 977. In fact, that Court cited the

Fourth Circuit Court decision of ***Crosson v. Vance.***

The case of ***Otto v. Alper***, (1980) 489 F. Supp. 953, although involving a collision between a sailboat and a motor boat which took place on navigable waters, seems to lean towards the theory that pleasure boating accidents do fall within the admiralty jurisdiction. (This was prior to the 1972 ***Foremost*** decision).

On the other hand, and after ***Foremost*** in 1983, in ***Francois v. Raybestos-Manhattan, Inc.,*** 577 F. Supp. 434, a Federal District Court in North Dakota decided that:

> The clear implication of ***Foremost Insurance*** is that any party asserting admiralty jurisdiction must be prepared to demostrate a significant connection with a traditional maritime activity.

This decision quotes the First Circuit opinion in the case of ***Austin v. Unarco Industries, Inc.,*** 1983, 705 F. 2nd 1, which emphasizes that the Supreme Court rejected the "traditional strict locality" test for admiralty tort jurisdiction in ***Executive Jet*** and required also "that the wrong bear a significant relationship to traditional maritime activity". The

Austin court repeats that the "only issue, therefore, is whether the wrong bears a significant relationship to traditional maritime activity". (*Austin v. Unarco Industries, Inc.*, 705 F. 2nd 1, at page 9).

It is evident that the same rules established in *Executive Jet* are being used by Court of Appeals as well as District Courts to rule in favor or against jurisdiction in injured swimmers cases and other admiralty jurisdiction situations.

Since *Executive Jet* critized jurisdiction in injured swimmers cases, but *Foremost* spoke about the negligent operation of a vessel on navigable waters, courts everywhere have no clear guidance from this Court in deciding to grant or deny jurisdiction in an injured swimmer situation. They may quote from the *Foremost* decision in finding that in an injured swimmer situation there is "no potential disruptive impact" to commercial navigation and thus deny jurisdiction. On the other hand, a Court could find that the wrong involves the negligent operation of a vessel (also cited in *Foremost)* and allow jurisdiction. Such an important question should be settled by this Honorable Court.

CONCLUSION

Black's Law Dictionary defines the term "navigate" in the following manner:

> To journey by water; to go in a vessel; to use the waters as a highway for commerce or communication; to ply, to direct one's course through any medium; to steer, especially to operate an airplane or airship. ***United States v. Monstad,*** C.C.A. Cal, 134 F. 2d 986, 987, 988.

Under this definition small boats and other pleasure crafts go from one place to the other by navigating. We disagree that the ***Foremost*** decision held that any accident involving any pleasure craft occurring as a consequence of the negligent operation of the same would be sufficient to establish jurisdiction under admiralty law. This was never the intention of ***Foremost.*** We sustain that something more than negligent navigation by a pleasure craft as the cause of an accident is needed under ***Foremost*** in order to obtain federal jurisdiction.

The United States has the Atlantic Ocean on the East, the Caribbean Sea and Gulf of Mexico on the South, the Pacific Ocean on the West

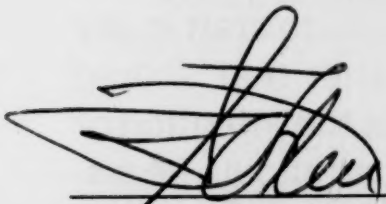
and many navigable rivers, lakes, streams and dams. Allowing federal maritime jurisdiction for every conceivable accident involving the negligent operation of any pleasure craft in ***any*** navigable water-body is a matter that should concern this Court. If such was the intention of this Court in ***Foremost,*** the matter should be clearly established to avoid continued conflict between the circuits and the various district courts.

For the reasons aforestated this Court should grant Certiorari to reverse the decision of the First Circuit Court of Appeals in this cases.

Respectfully submitted on this 27 day of August, 1984.

CERTIFICATE OF SERVICE: The undersigned attorneys being members of the Bar of this Honorable Court do hereby certify pursuant to Rule 28.5 of the Supreme Court Rules that three copies of this Petition for Certiorari were served and notified to the attorney for the Plaintiffs and Respondents, Edelmiro Salas García, at his address of record, Penthouse Esquire Building, Ponce de León Avenue corner Vela Street, Hato Rey, Puerto Rico 00918, by deposit on this date of said three copies in a United States Post Office,

certified mail, first class postage prepaid, return receipt requested.



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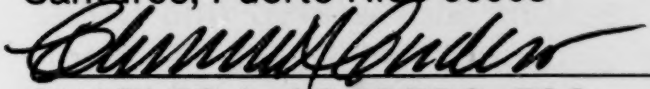

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FOR THE DEFENDANTS-PETITIONERS:

David Castañón Pérez
Ana María Caballín de Castañón
The Conjugal Partnership between David Castañón
Pérez and Ana María Caballín de Castañón
John Doe and Richard Roe
American International Insurance Company of Puerto Rico
One motor manufactured by Glastrom, Model 1982,
with 140 H.P. Evinrude engine, her tackle,

trailer, apparel and equipment, registered under licence no. 1292 L with the Puerto Rico Ports Authority under the name of Defendant David Castañón Pérez.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ABBOT BUDD KAUFER MEDINA, *et al*

Plaintiffs

VS.

DAVID CASTAÑON PEREZ, *et al*

Defendants

CIVIL NO. 82-2504

OPINION AND ORDER

This is an action seeking damages arising out of a boating accident. According to the complaint, on August 8, 1982 plaintiff Abbot Budd Kaufer Medina was swimming in Isla Verde public beach approximately 120-125 feet from the shore when he was struck by a pleasure motor boat operated by defendant David Castañón Pérez. As a result of the accident, Kaufer Medina sustained severe injuries. Plaintiffs then commmenced an action in the Superior Court of Puerto Rico, Carolina Part and thereafter, they also filed the present action in this court. Jurisdiction is pleaded under 28 U.S.C. Section 1333(1).[1] Defendants have filed a mo-

1. Section 1333 Admiralty, maritime and prize cases.
The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

tion to dismiss for lack of admiralty jurisdiction and/or motion to stay.[2]

This court's jurisdiction over the instant case depends on whether the law of admiralty extends to accidents involving small pleasure crafts engaged in non-commercial navigation and swimmers in tidal or navigable waters.

The test of admiralty tort jurisdiction is two-pronged. First, in cases of non-tidal waters (e.g. lakes, rivers, etc.) the alleged wrong must occur in navigable waters; in cases of tidal waters, the test of admiralty jurisdiction is the ebb and flow of the tide. ***United States v. Stoeco Homes, Inc.,*** 498 F. 2d 597 (3rd Cir. 1974), cert. denied, 420 U.S. 927 (1975). Second, the wrong must bear a significant relationship to traditional maritime activity. ***Richardson v. Foremost Insurance Co.,*** 457 U.S. 668 (1982); ***Executive Jet Aviation, Inc., v. City of Cleveland,*** 409 U.S. 249 (1972).

At the outset, we conclude that the first part of the jurisdictional test is satisfied; the accident occurring in a public beach 120-125 feet from the shore.

We turn now to the second requirement and what constitutes traditional maritime acti-

2. Due to our disposition of the jurisdictional question, we do not reach the arguments supporting the request for stay of proceedings.

vity. In ***Executive Jet, supra,*** at 270, a unanimous Supreme Court stated that admiralty was concerned with matters such as maritime liens, limitation of liability, cargo damage, and claims for salvage. Nevertheless, a divided Court in ***Foremost*** held that "because the wrong /t/here involve/d/ the negligent operation of a vessel on navigable waters, /there was/ a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction". ***Richardson v. Foremost Insurance Co.,*** 457 U.S. At 674.

On first impression it would seem that ***Foremost*** supports a finding of federal jurisdiction. But the statement of the Court must be analized within the factual context of that case where two pleasure boats collided on the Amite River in Louisiana, resulting in the death of one of the occupants. The Court extended admiralty jurisdiction due to the ***"potential disruptive impact of a collision between boats on navigable waters. . .coupled with the traditional concern that admiralty law holds for navigation".*** ***Id.*** at 675. Said holding is consistent with the Court's prior ruling in ***Executive Jet*** where it implicitly recognized admiralty jurisdiction in a ***Foremost*** situation pointing out that when a collision between vessels occurs, the law of admiralty looks to the navigational rules to determine fault, liability, and all other questions that may

arise from such a catastrophe. ***See also Lane v. United States,*** 529 F. 2d 175, 180 (4th Cir. 1975) ("collisions between vessels in navigation and ***submerged hulks of wrecked*** vessels are a traditional concern of admiralty").

Nonetheless, ***Executive Jet*** noted the absurdity of extending admiralty jurisdiction to cases involving injured swimmers and waterskiers. The Court said at 255-56:

> If a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains water damages from being dropped into a harbor by a land-based crane, a ***literal application of the locality test*** invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases ***such*** as ***these,*** some courts have adhered to a ***mechanical application*** of the ***strict locality rule and*** have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation.

This statement was documented in a footnote to a case involving an injury to a swimmer struck by a surfboard, ***Davis v. City of Jackson-***

ville Beach, Florida, 251 F. Supp. 327 (M.D. Fla. 1965), and another case involving an injury to a water skier; *King v. Testerman,* 214 F. Supp. 335 (E.D. Tenn. 1963). In subsequent cases involving water skiers struck by pleasure crafts various courts have held that the tort involved was not significantly related to traditional maritime activity. *Crosson v. Vance,* 484 F. 2d 840 (4th Cir. 1973); *Jorsch v. LeBeau,* 449 F. Supp. 485 (N.D. Ill. 1978); *Webster v. Roberts,* 417 F. Supp. 346 (E.D. Tenn. 1976). We fail to perceive any principled distinction between an accident involving a water skier struck by a boat and a swimmer so injured.[3] Therefore, *Executive Jet's* explicit disapproval of the exercise of admiralty jurisdiction in cases of injured swimmers or water skiers, and its progeny, control our decision today in the case at bar.

Foremost did not overrule *Executive Jet,* nor do we believe it intended to diminish its precedential value regarding injured swimmers ca-

3. In *Jorsch v. LeBeau,* 449 F. Supp. 485 (N.D. Ill. 1978), the accident occurred after the plaintiff had completed water skiing and was bodily in the water. The boat struck plaintiff while he was floating. The district court noted the distinction from *Crosson v. Vance, supra,* where the accident occurred while plaintiff was being towed by a motorboat. The district court, nevertheless, found that the difference was "immaterial to its conclusion that it lack/*ed*/ subject matter jurisdiction over /*the*/ cause". *Jorsch v. LeBeau, supra,* at 487, fn. 5.

ses.[4] Had this been a case involving the collision of two boats we would have been compelled to apply ***Foremost*** and exercise jurisdiction. ***See Richards v. Blake Builders Supply, Inc.,*** 528 F. 2d 745 (4th Cir. (1975).[5] However, that is not the situation here. We thus refuse to exercise jurisdiction over a tort involving an injured swimmer.

Clearly such jurisdiction would exceed the purposes of admiralty jurisdiction. In ***Crosson v. Vance, supra,*** at 840 the Court of Appeals for the Fourth Circuit stated that "/t/he admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vehicles from state to state and to and

4. Even though ***Foremost*** expressly limited ***Executive Jet*** to its particular facts, it also reiterated ***Executive Jet's*** determinations of federal admiralty jurisdiction outside the context of aviation torts. It noted approvingly the specific language of ***Executive Jet*** cited and relied upon in the body of this opinion. ***Foremost, supra,*** at 674, fn. 4.

5. In ***Richards,*** Chief Judge Haynsworth distinguished the position he had taken in ***Crosson*** concluding that the Supreme Court in ***Executive Jet*** had expressly disapproved the extension of admiralty jurisdiction to water skier cases, but that it had not rejected its prior approval of admiralty jurisdiction in cases involving pleasure boats generally. Today we join Chief Judge Haynsworth's position.

from foreign states". ***Foremost*** made clear, however, that the federal interest in protecting maritime commerce could not be adequately served if admiralty jurisdiction is restricted to commercial activity, but as we have established, such language was originally set forth in the context of a collision between two boats. Undoubtedly, there is an eminent ***federal interest in maintaining uniform rules of conduct regarding the collision of boats or ships.*** Such an interest is totally absent in actions involving injured swimmers. In that type of case the paramount interest sought is not to protect maritime commerce but rather to protect the lives of swimmers, water skiers, and bathers in tidal or navigable waters. Unquestionably that is an interest within the realm of state law. "The Federal Government", as stated by Justice Powell dissenting in ***Foremost, supra,*** at 685, "has little or no genuine interest in the resolution of a garden variety tort case".

Additionally, the application of admiralty law to injured-swimmer cases would "impliedly ***/prohibit/*** the exercise of state legislative power in an area in which local legislatures have generally been thought competent". Stolz, ***Pleasure Boating and Admiralty: Erie at Sea,*** 51 Calif. L. Rev. 661, 664 (1963). ***See also,*** Swaim, ***Yes, Virginia, There is an Admi-***

ralty: the Rodrigue Case, 16 Loy. L. Rev. 43, 44 (1969-70) in which it was stated that in admiralty law the term jurisdiction defines both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be applied by those *courts considering the controversy. This is so because a* court of admiralty sits solely to administer and apply maritime law. To find jurisdiction in this case would constitute an usurpation of state sovereignty, and a displacement of state responsibility which federal courts should avoid. Such an exercise of jurisdiction would not only burden the federal courts but would also frustrate the purposes of state tort law. *Adams v. Montana Power Co.,* 528 F. 2d 437 (9th Cir. 1975). In essence, concerns of federalism further mandate that this action be dismissed for lack of admiralty jurisdiction.

Finally, the result we reach today in no way inequitably harms plaintiffs since as stated before, prior to the filing of this action they had filed a similar complaint in the Superior Court of Puerto Rico, Carolina Part, which is competent to hear such matter. Said court denied defendants' motion to stay proceedings and reasserted its jurisdiction over the subject matter and the parties involved. Moreover, co-defendant American International Insurance

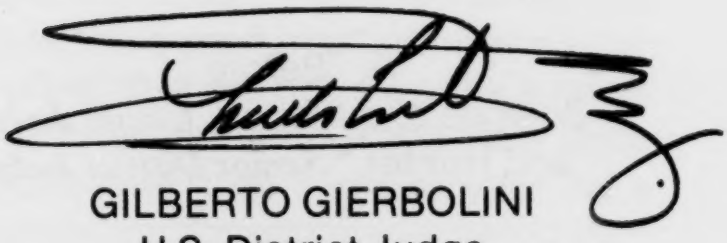
Co. of Puerto Rico, defendant Castañón's insurer, has consigned the sum of $100,000 in that court.

WHEREFORE, in view of the above, it is ordered that defendants' motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction be and is hereby granted, and consequently, the complaint herein is dismissed.

The clerk shall enter judgment accordingly.

SO ORDERED.

San Juan, Puerto Rico, this 15th. day of November, 1983.



GILBERTO GIERBOLINI
U.S. District Judge

United States Court of Appeals
FOR THE FIRST CIRCUIT

ABBOT BUDD KAUFER MEDINA, *et al*

Plaintiffs, Appellants

VS.

DAVID CASTAÑON PEREZ, *et al*

Defendants, Appellees.

CIVIL NO. 83-1900

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
***[Hon. Gilberto Gierbolini,* U.S. District Judge]**
[575 F. Supp. 168]

Before
Bownes and Aldrich, ***Circuit Judges,***
and Hunter,* ***Senior District Judge.***

Edelmiro Salas García for appellants.

Charles A. Cordero, with whom ***Cordero, Colón & Miranda*** was on brief, for appellee American International Insurance Company of Puerto Rico.

Agustín F. Fortuño for David Castañón Pérez, et. al.

May 2, 1984

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*Of the Western District of Missouri, sitting by designation.

ALDRICH, *Senior Circuit Judge.* Abbot Kaufer Medina and Luis Vélez Medina while swimming somme 120 feet off a public beach in Puerto Rico, were struck and injured by a small outboard-powered pleasure boat operated by defendant David Castañón Pérez. They, along with various family members, sued in the District Court, asserting admiralty jurisdiction. The court concluded that there was none, and dismissed the action. Plaintiffs appeal. We reverse.

Two relatively recent Supreme Court opinions are particularly relevant. In ***Executive Jet Aviation, Inc.*** v. ***City of Clevelant,*** 409 U.S. 249 (1972), a unanimous Court held that the location where the actual injury occurred did not determine the question of admiralty jurisdiction, a ruling that did not surprise a court which had learned the hard way that a dock could be "unseaworthy."[1] In ***Executive Jet*** a plane, allegedly improperly maneuvered over land, crashed into navigable waters. The Court, seeing no misconduct of a maritime nature, declined to hold that the locale of the injury conferred admiralty jurisdiction. There-

1. *Gutiérrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963), reversing *Waterman S.S. Corp.* v. *Gutiérrez,* 1 Cir., 1962, 301 F. 2d 415 (longshorema slipped on beans spilled on dock by reason of ship's unseaworthiness; known locally as the unseaworthy dock case.)

after, in ***Foremost Ins. Co.*** v. ***Richardson,*** 457 U.S. 668 (1982), the Court faced the question whether the maritime nature and locale of an accident resulted in admiralty jurisdiction when there was no commercial activity. Two small outboard-powered pleasure craft had collided on navigable waters. In an application of the "half-full-or-half-empty" approach, the majority ruled that, although there was no commercialism, half-full was enough, while the dissent considered the cup basically empty, regarding the Court as expanding traditional jurisdiction by eliminating a commercialism requirement.

The district court viewed one pleasure craft and a swimmer as a further refinement. In ruling against admiralty jurisdiction, it relied in part on a footnote in ***Executive Jet,*** more a factual recital than an expression of opinion, that it read as disapproving a case assuming jurisdiction over a suit by a water skier against the operator of his towboat. ***See Executive Jt,*** ante, 409 U.S. at 255-56 n.5 (citing ***King*** v. ***Testerman,*** 214 F. Supp. 335, 336 (E.D. Tenn. 1963)). Principally, however, the court relied on two Fourth Circuit decisions interpreting ***Executive Jet.*** These decisions, both of which preceded ***Foremost,*** held, on the one hand, that admiralty jurisdiction did not extend to a

suit by a water skier against his towboat operator, ***Crosson*** v. ***Vance,*** 4 Cir., 1973, 484 F. 2d 840, and, on the other, that it did extend to suits by pleasure-boat passengers injured when equipment on the boats they were aboard apparently malfunctioned, causing, in one case, an explosion, and, in the other, a collision with a river bank. ***Richards*** v. ***Blake Builders Supply, Inc.,*** 4 Cir, 1975, 528 F. 2d 745. Thus, the Fourth Circuit drew a distinction between persons injured on board a boat and those injured outside. The district court adopted this distinction, and, finding none further "between and accident involving a water skier struck by a boat and a swimmer so injured," held that it had no jurisdiction.

Even if this distinction were reasonable after ***Executive Jet,*** we do not believe it survived ***Foremost.*** The focus of ***Foremost*** was whether the wrong was related to "traditional maritime activity," and the Court made clear that the most fundamental of such activities is navigation of a vessel. The wrong alleged here was negligent navigation. There is no requierement that two vessels be involved in order to create admiralty jurisdiction. Nor is this an injured swimmer case such as those cited in ***Foremost,*** where the swimmer struck a submerged object, or another swimmer. ***Fore-***

most's citation to *Executive Jet,* for cases with "absolutely no connection to maritime activity," omitted mention of the water-skier case relied upon by the Fourth Circuit and the court below. *Foremost,* 457, U.S. at 674 n.4. We understand the district court's concern that the occurrence here may involve no significant federal interest, but this approach to the scope of admiralty jurisdiction was the view of the *Foremost* dissenters. The actor in this case was a vessel, and that is enough. Once given that defendant's boat is not excluded because non-commercial, it should make no difference that plaintiffs were in navigable waters rather than on them. We will leave to another day when an outboard goes out of control, runs ashore, and hits a sunbather. *But cf.* 46 U.S.C. § 740.

Reversed.

United States Court of Appeals
FOR THE FIRST CIRCUIT

ABBOT KAUFER MEDINA, *et al*

Plaintiffs, Appellants

VS.

DAVID CASTAÑON PEREZ, *et al*

Defendants, Appellees.

CIVIL NO. 83-1900

JUDGMENT
Entered: May 2, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgement of the District Court is reversed.

By the Court:
Francis P. Scigliano
Clerk

(cc: Messrs. Salas García, Fortuno and Cordero)

United States Court of Appeals
FOR THE FIRST CIRCUIT

ABBOT KAUFER MEDINA, *et al*

Plaintiffs, Appellants

vs.

DAVID CASTAÑON PEREZ, *et al*

Defendants, Appellees.

CIVIL NO. 83-1900

ORDER OF COURT
Entered: June 6, 1984

The judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is hereby denied.

By the Court:

[cc: Messrs. Salas García, Cordero and Fortuno.]